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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 AARON STREEPY, an individual,

11 Movant,

12 v.

13 JOSEPH H. EMMONS, individually, AND
14 OSPREY FIELD CONSULTING LLC, a
limited liability company,

Respondents.

CASE NO. 3:24-mc-05005-DGE

**REPLY IN SUPPORT OF MOTION
TO QUASH OR MODIFY THIRD-
PARTY SUBPOENA**

NOTE ON MOTION CALENDAR:
May 10, 2024

15 **I. THIS COURT SHOULD NOT TRANSFER THE MOTION AS THE MATTER**
16 **DOES NOT INVOLVE “EXCEPTIONAL CIRCUMSTANCES.”**

17 The Respondents bear the burden of demonstrating that exceptional circumstances warrant
18 a transfer of this matter. *STA Grp. LLC v. Motorola Sols. Inc.*, 2024 WL 1091691, at *1 (W.D.
19 Wash. Mar. 13, 2024); *U.S. Plywood Integrity Coal. v. PFS Corp.*, 2021 WL 409968, at *4 (W.D.
20 Wash. Feb. 5, 2021). Courts consider the “complexity, procedural posture, duration of pendency,
21 and the nature of the issues pending before, or already resolved by, the issuing court in the
22 underlying litigation.” *Judicial Watch, Inc. v. Valle Del Sol, Inc.*, 307 F.R.D. 30, 34 (D.D.C. 2014).
23 See also *STA Grp. LLC* 2024 WL 1091691, at *2. Taking those factors into account, transfer of

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1 the instant motion to a different court is not warranted.

2 **A. Complexity**

3 Respondents have failed to provide evidence that the underlying matter is complex. That
4 case, *Guenther v. Emmons et al.*, Case No. 2:22-cv-00272-TOR (E.D. Wash.) (*Guenther*), involves
5 a dispute between a single plaintiff, Guenther, and two defendants, a natural person and his solely
6 owned company. The allegations in that case, standard tort claims of defamation and false light
7 invasion of privacy, do not meet the complexity seen in cases cited by the Respondents. One
8 concerned “a complicated patent case, asserting infringement of four separate patents...” *STGA*
9 *Grp. LLC*, 2024 WL 1091691, at *2. Another, *U.S. Plywood*, involved a complex Lanham Act false
10 advertising action where the non-party’s (“APA”) “Product Advisory on Brazilian plywood”
11 necessarily intertwined with elements of the case since all the plaintiffs were members of APA.
12 *U.S. Plywood* at *5. Both of those cases rely, in part, on a “consolidated case ... which involves
13 constitutional challenge to Arizona Senate Bill 1070 ... a controversial state immigration
14 initiative.” *Judicial Watch, Inc. v. Valle Del Sol, Inc.*, 307 F.R.D. 30, 32 (D.D.C. 2014).

15 Unlike the cases cited by Respondents, this matter is a garden variety tort claim.
16 Respondents have failed to show otherwise, let alone meet their burden to show that the matter is
17 in any way complex.

18 **B. Procedural History & Nature of the Issues Pending and Resolved**

19 Unlike in *Deer & Co. v. XAPT Corp.*, cited by Respondents, where the trial court had deep
20 familiarity and ongoing discovery issues, this case lacks a similar depth of preceding judicial
21 engagement. *Deer & Co.*, 2022 WL 522992, at *1 (W.D. Wash. Feb. 18, 2022). In *Deer & Co.* the
22 court noted that the trial court had “recently issued an extensive opinion resolving nearly *a dozen*
23 of the parties’ motions, including multiple motions to dismiss and a motion to stay, evidencing the

1 Illinois Court’s significant knowledge of the facts, procedural posture, and issues underlying the
2 parties’ dispute.” *Deer & Co.*, 2022 WL 522992 at *3 (emphasis added). The Court further noted
3 that “the Illinois Action requires the determination of several pending discovery motions” and
4 listed five such motions. *Id.*

5 The present matter is not analogous. Currently, the only significant pending motion
6 identified by Respondents is a motion for Voluntary Dismissal Without Prejudice, which does not
7 compare to the “flurry of motion practice over the validity of, and compliance with, three virtually
8 identical subpoenas issued ... in connection with the pending” case that was presented in *Judicial*
9 *Watch*. 307 F.R.D. at *31-32.

10 Respondents note that the Hon. Judge Rice, E.D. Wash., has previously denied a motion to
11 stay discovery, and reference a motion to compel discovery after they “spent months attempting to
12 obtain the NDA parties’ consent” to discover confidential information. That motion pertained to a
13 non-party to the litigation, was stipulated to by the *Guenther* plaintiff, and the *Guenther* plaintiff
14 agreed to expedite the process.

15 Additionally, Respondents cite no motion to compel discovery previously issued against
16 the *Guenther* plaintiff or any pending discovery motion or dispute between the parties to that
17 action. The instant effort by the *Guenther* defendants to seek discovery from the *Guenther*
18 plaintiff’s counsel appears to be the only discovery matter pending resolution. Therefore,
19 Respondents have failed to show exceptional circumstances exist as to the nature of the issues
20 pending because the dispute pending in Eastern Washington does not include the types of
21 procedural entanglement, i.e., continuing and contentious unresolved discovery disputes, that have
22 warranted transfers in other cases.

23 C. Avoiding Inconsistent Holdings

1 Respondents allege that the issuing court already heard arguments related to this non-party
2 subpoena. Defendants provided the transcript resolving that motion, which clearly states what was
3 in front of Judge Rice: “Counsel, this teleconference was to get an expedited ruling on the
4 plaintiff’s request that discovery not continue pending resolution of the order to dismiss.”
5 Documents 8-1, Tr. 9, 20-21.

6 Respondents very clearly misinterpret that ruling. It is specious, as well as wholly
7 inconsistent with Rule 45, to suggest that the Eastern District of Washington court, in ruling on a
8 dispute brought to it by parties over which it had jurisdiction, intended to issue a decision relating
9 to the rights of a non-party, Mr. Streepy, outside the presence of counsel for that non-party, and
10 without any consideration of whether the non-party had an opportunity to consult with counsel in
11 order to protect his substantive and procedural rights.

12 The alternative, and obvious, interpretation to the Eastern District court’s ruling is that the
13 court was doing exactly what it said it was doing, providing “an expedited ruling on the plaintiff’s
14 request that discovery not continue...” Documents 8-1, Tr. 9, 20-21. This interpretation respects
15 both the letter and intent of FRCP 45 and the due process and representational rights of a non-party
16 to the motion to stay.

17 The instant Court has jurisdiction and is fully informed on the singular active discovery
18 motion regarding the underlying litigation. The Court should decline to transfer the case under the
19 exceptional circumstances precedent as Respondents have failed to prove the exception should
20 apply – because the matter is not complex, has limited relevant procedural history or issues
21 pending, and there is no concern of an inconsistent holding.

22 **II. RESPONDENTS HAVE FAILED TO PROVE THAT THE *SHELTON* TEST HAS**
23 **BEEN SATISFIED**

1 In a highly unusual move, Mr. Emmons subpoenaed Mr. Streepy, seeking discovery
2 relating to an ongoing legal dispute (*Guenther*) from the attorney for the party Mr. Emmons' client
3 opposes in that litigation. Mr. Streepy filed a motion to quash or modify because, in part, Mr.
4 Emmons has not demonstrated that "no other means exist to obtain the information than to depose
5 opposing counsel" and that "the information sought is relevant and nonprivileged."

6 In large part, Mr. Emmons seeks to know what Mr. Streepy told his client Ms. Guenther
7 and when he told her. Mr. Emmons has not deposed Ms. Guenther. To the extent that any of those
8 communications are not privileged, Ms. Guenther can tell Mr. Emmons. Thus, Mr. Emmons fails
9 the first element of the *Shelton* test because he has not shown "no other means exist to obtain
10 information."

11 To the extent any of those communications are privileged, Mr. Emmons fails the second
12 element of the *Shelton* test which prohibits seeking information unless it is "relevant and
13 nonprivileged."

14 The argument that Mr. Streepy can make objections during the deposition as to privilege
15 disregards the purpose of the *Shelton* rule. *Shelton* makes it clear that it requires extraordinary and
16 rare circumstances to even seek a deposition of opposing counsel. This is because unscrupulous
17 attorneys will seek a deposition prior to satisfying the elements of *Shelton* in order to harass
18 opposing counsel. It has the benefit of forcing opposing counsel to divide their time and often
19 drives a wedge between opposing counsel and their client.

20 **III. TO THE EXTENT THAT THIS COURT DEEMS IT APPROPRIATE TO**
21 **PERMIT MR. STREEPY TO BE DEPOSED, THAT DEPOSITION SHOULD BE**
22 **LIMITED TO APPROPRIATE INQUIRIES THAT WILL NOT IMPLICATE**
23 **THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN MR. STREEPY AND**
24 **HIS CLIENT OR INFRINGE UPON THE ATTORNEY WORK PRODUCT**
DOCTRINE

1 Notwithstanding the above, arguments, Mr. Streepy would not oppose, if necessary,
2 submitting to a deposition that is appropriately limited so as to protect his rights and the rights of
3 his client.

4 Thus, for example, to the extent that Emmons' Response characterizes Mr. Streepy's
5 handwriting as "largely illegible," Mr. Streepy has no issue with being deposed for the limited
6 purpose of assisting in deciphering his handwriting. (He would also assist them without the need
7 for a deposition if they would like to set up a Zoom call and go through the documents with him.)

8 Mr. Streepy is similarly willing to agree to sit for a deposition limited to specific non-
9 privileged factual inquiries that do not impinge upon his impressions, opinions, and other legal
10 conclusions, provided it occurs after the deposition of Plaintiff and non-party Renner. Specifically,
11 Mr. Streepy is willing to answer the only arguably relevant and non-privileged line of inquiry that
12 the Respondents have actually identified in their response. That inquiry, as framed by Respondents,
13 would relate to the claim that "Respondents have not been able to determine who Mr. Streepy
14 spoke with during the course of his investigation or who he discussed his investigation with."
15 Response to Motion to Quash, p. 4; *see also id.*, p. 8 ("Respondents seek to depose Mr. Streepy
16 regarding the following: (1) the individuals and/or entities (including union chapters) with whom
17 Mr. Streepy had relevant communications about the investigation and/or the NDAs, and when he
18 communicated with them; (2) the substance of any relevant non-privileged communications Mr.
19 Streepy had regarding the investigation and/or NDAs, particularly during the time between when
20 he was hired to start the investigation and when he, Guenther, and Renner initiated the merger;
21 and (3) an explanation of the notes Mr. Streepy produced from his investigation."). Mr. Streepy is
22 willing to answer questions that are strictly limited to these issues which do not infringe on
23 attorney-client privileged communications or information that is protected under the attorney work

1 product doctrine, fully and truthfully.

2 An order modifying the deposition subpoena in such a way that it is limited to these
3 inquiries, which are strictly factual inquiries into non-privileged events and communications,
4 would reduce any disruption to Mr. Streepy's practice, prevent needless debates on the extent to
5 which certain of Mr. Streepy's thoughts, memories and impressions are protected by the attorney-
6 client communication privilege and/or the work product doctrine, and result in questioning of Mr.
7 Streepy relating only to those matters that the Emmons defendants could not obtain elsewhere, as
8 the *Shelton* rule requires.

9 **IV. FEES SHOULD NOT BE AWARDED TO THE RESPONDENT IN RELATION**
10 **TO THIS MOTION**

11 Defendants request sanctions under 28 U.S.C. § 1927 or under the Court's inherent
12 authority. "A district court may impose sanctions under section 1927 only on a showing of the
13 attorney's recklessness or bad faith." *Estate of Blas v. Winkler*, 792 F.2d 858, 859 (9th Cir. 1986).
14 Courts award sanctions for similar reasons under their inherent power. *See, e.g., Goodyear Tire &*
15 *Rubber Co. v. Haeger*, 581 US 101 (2017). Bad faith is a greater standard than Fed. R. Civ. P. 11
16 which does not require bad faith. "Bad faith is present when an attorney knowingly or recklessly
17 raises a frivolous argument, *see, e.g., Optyle Eyewear*, 760 F.2d at 1050-51, or argues a meritorious
18 claim for purpose of harassing an opponent." *Estate of Blas*, 792 F.2d at 860.

19 Here, Mr. Streepy has the right under Civil Rule 45 to file the instant motion in this Court,
20 asking this Court to hear his challenges to the subpoena. To the extent that Judge Rice may have
21 indicated that he thought that third-party discovery directed at Mr. Streepy was appropriate, while
22 specifically ruling only on a motion to stay discovery brought by the plaintiff in *Guenther*, that
23 indication was in no way binding on Mr. Streepy, who is not a party to that litigation, had not
24 agreed to submit the question of his rights and obligations to that tribunal, and did not have his

1 counsel present. Therefore, no ruling related to the *Guenther* litigation can be construed as a ruling
2 regarding Mr. Streepy's right to move to quash a subpoena directed at him. At the very least,
3 Respondents have not shown any semblance of bad faith. For these reasons, fees are not
4 appropriate.

5 **V. CONCLUSION**

6 For the reasons stated above, the Movant respectfully renews its request that this Court
7 grant this motion to quash the deposition subpoena for Aaron Streepy or, in the alternative, to order
8 that only a limited deposition should occur, consistent with the foregoing argument.

9 I certify that this memorandum contains 2,060 words, in compliance with the Local Civil
10 Rules.

11
12 RESPECTFULLY SUBMITTED this 10th day of May, 2024.

13 s/Dmitri Iglitzin
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